
SOUTH AFRICA / JUDGMENT

Van Rensburg v Obiang (21748/2014) [2021] ZAWCHC 128 (18 June 2021)

[2021] ZAWCHC 128

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

21748/2014

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In the High Court of

South Africa

(Western

Cape Division, Cape Town)

Case

No: 21748/2014

In

the matter between:

DANIEL

WELMAN JANSE VAN RENSBURG

PLAINTIFF

and

TEODORIN

NGUEMA OBIANG

DEFENDANT

Date of hearing: 08 March

2021

Delivered

electronically: 18 June 2021

JUDGMENT

LEKHULENI AJ

INTRODUCTION

[1] The plaintiff claimed for damages suffered whilst in a vulnerable state and at the mercy of the defendant in Equatorial Guinea. By virtue of the final order of attachment *ad fundandam jurisdictionem* granted by this Court on 17 October 2017 in respect of the immovable properties of the defendant, this Court has jurisdiction to hear the matter. This decision was taken on appeal by the defendant and the full bench of this Court upheld the final attachment order on 20 August 2019.

[2] The claim emanated from human rights abuses, torture, inhumane and degrading treatment that he suffered while he was kept as a prisoner and / or detained without trial for a long period of time. Pursuant thereto, there were numerous applications before this Court, the Supreme Court of Appeal and the Constitutional Court leading to this hearing. The latter was an application to strike out the defendant's defence, failing the request by the plaintiff to the defendant to discover some crucial documents. This Court granted the said application on 17 August 2020. Since there were no issues raised further on the merits, after a long-drawn-out history of litigation, the matter for determination before this Court

was on the merits of the plaintiff's claim and on quantum. When the matter appeared before me it proceeded on an unopposed

basis.

[3] Effectively, the plaintiff claimed damages for an amount of R65 000 000.00 (sixty-five million rand) arising out of his multiple unlawful arrests, imprisonment and torture in Equatorial Guinea in facilities under the command and control of the defendant. The defendant served as the second Vice President of Equatorial Guinea for Defence and Security. The defendant also served as the political head and has been in charge of the armed forces, police, security, border control, prisons and detention facilities in Equatorial Guinea including the facilities in which the plaintiff was detained and tortured.

[4] The plaintiff avers in his summons that in October 2013 he was arrested by the Rapid Intervention Force ("RIF"), a division of the Equatorial Guinea police at the instance of one Gabriel Mba Bela ("Angabe") an uncle of the defendant. He stated that his arrest was unlawful and unsupported by any grounds. He spent a night in Guantanamo prison and was later released upon being induced to sign a document acknowledging that he received money from Angabe in respect of a business deal from which Angabe wanted to renege. He was later placed under *de facto* house arrest in an apartment that belonged to Angabe in Malabo where he remained until about 7 November 2013.

- [5] On or about 07 November 2013, he was re-arrested by the RIF and returned to Guantanamo where he was manhandled into a room and handcuffed in both hands. The following day the plaintiff was brought before a Judge who released him back to house arrest in Angabe's apartment. Angabe caused a charge of fraud to be laid against the plaintiff. When the plaintiff appeared before the same Judge, the Judge dismissed the charge and gave the plaintiff permission to leave. The Plaintiff subsequently approached the South African Embassy in Malabo and he stayed for about two weeks.
- [6] The plaintiff pleads further that he was subsequently issued with an emergency passport after the Equatorial Guinea Minister of Foreign Affairs and the Minister of Security confirmed to the South Africa Embassy that the plaintiff could leave their Country. While waiting to board his flight at the airport, the plaintiff was accosted by Angabe and was detained on Angabe's instructions in the office of the police commander of the airport. Angabe seized the plaintiff's cellphone and as a result, plaintiff was unable to be assisted by the South African embassy officials. However, he surrendered his personal belongings to the South African Consular officials. The plaintiff was then taken to Guantanamo by the members of the RIF where he attended at the Judges' Chambers and was later locked in a small holding cell. The plaintiff avers that later in the day, he was taken to Black Beach prison where he was detained from 18 December 2013 to 28 February 2014. According

to him, there were no reasons advanced why he was detained or for how long he would be detained. The plaintiff contended in his summons that he endured inhumane and dehumanizing treatment over an extended period of time at Black Beach prison.

- [7] On 28 February 2014, the plaintiff was brought before a Judge in Chambers who ordered his release, but placed him under house arrest where he remained under surveillance. On 03 July 2014 he was called to appear before a Judge in Chambers and he was arrested again and sent back to Black Beach prison where he was detained from 04 July 2014 to 26 August 2015. He was not charged or informed of the reasons for his detention or how long he would be detained. He was eventually released on or about 26 August 2015 without being charged and he departed from Equatorial Guinea back to South Africa

on 26 September 2015. In essence, he was detained for a total of 549 days, of which 423 he was imprisoned in Black beach prison.

A BRIEF SUMMARY OF EVIDENCE

- [8] For the sake of brevity, I will not repeat the evidence of the witnesses verbatim, but will briefly summarise the evidence for the purposes of this judgment. The plaintiff testified and even submitted a damages affidavit in support of his claim. He confirmed the contents and correctness of his affidavit. He testified that the defendant Obiang Nguema was at all relevant times the Minister in charge of state security and prisons in Equatorial Guinea and was responsible for his unlawful arrest, imprisonment and torture. The defendant controls the RIF that arrested him several times as well as the prison in which he was held. The plaintiff testified that he has been involved in various business activities in several African

countries. He was initially involved in DSTV contracts and he then later was involved in aviation. He had a good name in business and due to his business acumen and connection in the oil Industry, during 2011, Angabe, asked him to assist them in setting up a private airline. However, they did not have a business licence. The airline was to be called Coriscair. Angabe was happy with the plaintiff's previous business contracts. Angabe accordingly signed a document authorising plaintiff to enter into the agreement that would enable Coriscair to become fully operational. Angabe was to be the principal shareholder and financier of the business.

- [9] From 2011 to 2013, the plaintiff worked tirelessly to secure the operators' licence for the proposed airline. It was a tedious exercise that involved many flights from Equatorial Guinea to South Africa. During July 2013, the Equatorial Guinea aviation authority issued a temporary air operator's licence. On 02 October 2013,

the Equatorial Guinea aviation authority granted authorisation to operate the airline via Cemair. The plaintiff prepared to return to South Africa in October 2013 to take delivery of the aircraft in order to start the business with Angabe. He went to Angabe and gave him all the necessary documents and the approval from the South African Civil aviation. Shortly thereafter, on 24 October 2013, Angabe called him to his house and reneged from the business that they planned. According to plaintiff, this was apparently due to shortage of funds to finance the intended business. Angabe demanded all the money that he advanced to the plaintiff in preparation for the private airline. The plaintiff could not remember how much Angabe demanded from him.

- [10] The plaintiff testified that he utilised the money in question for flying back and forth between the two countries in preparation of this airline venture. The plaintiff explained to Angabe that he expended the money and did not have same. He told Angabe that he used the bulk of the funds to facilitate the lease of the aircraft which included plaintiff's agreed monthly fee. An angry confrontation ensued and shortly thereafter, Angabe called the RIF private force which the defendant used as his private security to arrest the plaintiff. The plaintiff testified that the defendant and Angabe are known to be close and are partners in several joint business ventures. The RIF arrested the plaintiff and took him to Guantanamo prison. Angabe attended at Guantanamo prison and accused the plaintiff of being a liar and thief. The defendant called Guantanamo prison and ordered that the plaintiff be detained. The plaintiff testified that he was tightly handcuffed so much so that his wrists were cut. His hands were handcuffed to a rail in one of the rooms in a dungeon. He witnessed inmates being tortured in his presence in prison. He was later thrown in a small cramped cell with about thirty inmates. The plaintiff was further tortured by other inmates in the cell. His arms ached from being handcuffed. He found it difficult to breathe in the room as it was hot and humid. He could

not even swat a cloud of mosquitos away as his hands were cuffed behind his back. The floor of the cell was slippery and covered with human blood and vomit. He testified that the toilets were full of excrements. He had to ask an inmate to unbutton his jeans so that he could relieve himself. He spent sleepless nights sitting against the wall. It was pitch dark in the cell and sweaty bodies pressed up against him.

- [11] It was his testimony that after he was forced to sign a document in prison by a personal assistant of Angabe, he was released to go to his apartment where he lived before he was re-arrested. After he was released, he suffered a severe bout of malaria and he was sweating and vomiting. On 06 November 2013 he was informed that Angabe demanded a meeting with him. He attended the meeting and when he arrived at Angabe's house, the RIF handcuffed him and threw him into the back of the police van and he was taken back to Guantanamo prison. He experienced the same appalling conditions at Guantanamo prison as before. The cell in which he was incarcerated was even more overcrowded than the previous cell.
- [12] On 08 November 2013 he was taken to a Judge and the Judge advised him that Angabe had laid a charge of theft against him. He told the Judge that he received a deposit from Angabe that was utilised to procure an aircraft and for payment of the licence and permits in preparation of the airline business. The Judge found him not guilty and released him. After he was released, he took refuge at the South African Embassy. On 18 December 2013, the embassy issued him with an emergency passport confirming that he was free to leave Equatorial Guinea. However, the following day at the airport as he was making his way passing the securities and to the aeroplane, Angabe appeared from the terminal building and instructed a police man to arrest the plaintiff. Thereafter, the RIF arrived, manhandled him and took him to custody at the airport. He was later taken to Black Beach Prison by police officers. Black Beach prison is known to be one of the cruellest prisons in the world. According to his testimony, his experience in this prison indeed confirmed the fact that it was one of the cruellest in the world. The prison cells were tiny and overcrowded. Inmates were packed into every available space.
- [13] The plaintiff could recall that there were about four hundred prisoners at any given time in that prison. There were only two bathrooms to serve this prison population. He witnessed horrific incidents in this prison. Among others, he witnessed inmates being beaten and others stabbing each other. He witnessed inmates being raped; some inmates executed by the firing squad; and the armed guards shooting and killing each other after drinking beer. He further witnessed many dead bodies of prisoners who succumbed from being beaten removed from the cell. According to the plaintiff, this was a fact of life in that prison and everybody expected to die at any time.

- [14] During this period, the Ambassador of South Africa visited him in prison and told him that it was the defendant who was behind his incarceration. On 24 September 2015 while the defendant and Angabe were out of the country and with the assistance of other officials, the plaintiff testified that he managed to escape this gruesome torture and he left Equatorial Guinea.
- [15] It is apparent that the incident of his incarceration and torture has affected him tremendously. He is suffering from the after effects of this ordeal including post-traumatic stress disorder which makes it difficult for him to work in his professional field in which he was trained. For instance, the sound of gate closing and locking causes him great anxiety. It was his testimony that he will not forget the slamming of the prison doors. He has great difficulty with concentration and focusing on a task as a result of the ordeal. He suffers from panic attacks which he sometimes experience several times daily. This caused him great hardship and he no longer feel himself. The result of which he gets disorientated in his house.
- [16] Mignon Coetzee (“Ms Coetzee”) also testified in support of the plaintiff’s evidence. She is a registered Clinical and Forensic Psychologist. She was asked to prepare a neuropsychological evaluation of the plaintiff. Ms Coetzee confirmed the contents and the correctness of the report that she prepared. In brief, her evidence was that she assessed the plaintiff in order to determine the possible neuropsychological

effects of the emotional and physical trauma he suffered during his incarceration at Black Beach prison in Equatorial Guinea. Based on her clinical evaluation, the plaintiff experienced severe and persistent psychological problems including Post-Traumatic Stress

Disorder, Major Depressive Disorder and Panic Disorder. In her expert opinion, these psychiatric symptoms directly stem from the protracted and significant trauma the plaintiff suffered during his incarceration. Ms Coetzee corroborated the evidence of the plaintiff that subsequent to the plaintiff’s release, he has been experiencing cognitive and neuropsychological difficulties

including reduced concentration and mental stamina, distractibility, difficulty in terms of multi-tasking and impaired memory.

- [17] Ms Coetzee noted that individuals who have suffered severe trauma and present with trauma-related disorders, have a reduced stress threshold as well as reduced mental or neurocognitive efficiency. Her clinical observation was that the plaintiff’s capacity to utilise his innate cognitive ability is severely compromised, primarily due to the enduring neurobiological effects of stress and trauma. In her expert opinion, the plaintiff will not be able to function in a competitive work environment. She noted further that in spite of having received trauma counselling and psychotherapy since his release, the plaintiff remains both psychologically and cognitively affected. Furthermore, in spite of further treatment, it is highly improbable that plaintiff’s cognitive aspect will improve significantly. Based on her assessment, she is of the view that the plaintiff’s chances of competing in the open labour market has been permanently and irreversibly altered. The plaintiff’s reduced

stress tolerance and his related neuropsychological difficulties constitute a significant handicap.

[18] Ms Nadya Wynchank (“Ms Wynchank”) was present in court however her evidence was presented on affidavit in terms of Rule 38 of the Uniform Rules of Court. She is also a registered Clinical and Forensic Psychologist. She was asked to conduct a Psychological and diagnostic assessment of the plaintiff in order to provide the court with an expert opinion regarding the impact of the plaintiff’s arrests, detentions and incarceration in Equatorial Guinea on his mental health. Ms Wynchank recorded that the plaintiff underwent a mental state examination to establish his functioning in various domains. The plaintiff was observed to be tangential and at times confused. His concentration was observed to be variable. He seemed to lose focus easily and was observed to frequently digress when answering questions. Ms Wynchank reported that the plaintiff’s personality, psycho-social and occupational functioning has been severely impacted by his experience in Equatorial Guinea. The quality of plaintiff’s life has been severely diminished as a result of his psychiatric disorders. According to her, the plaintiff seems to have lost his vitality, lost interest in the world and in his capacity to engage with courage, confidence and enthusiasm. This can be understood as a direct consequence for his trauma and the resulting post-traumatic stress disorder, depression and anxiety disorders that followed. The plaintiff’s incarceration at Black Beach prison has transformed him from a dynamic confident capable businessman and entrepreneur to an anxious, socially isolated fearful and co-dependant man whose capacity to experience joy or pleasure is limited or absent. Ms Wynchank noted in her report that as a result of this ordeal, it is highly unlikely that the plaintiff will be able to compete in the job market.

[19] The plaintiff also filed a report of Johan George Schwalb an Actuary, and a fellow of the Actuarial Society of South Africa. He was instructed to estimate the present value of earnings that the plaintiff would have accrued had he not been incarcerated in Black Beach prison in Equatorial Guinea during the periods 18 December 2013 – 28 February 2014, and 04 July 2014 to 26 August 2015. In his report dated 15 November 2020, Mr Schwalb estimated the plaintiff’s past earnings from December 2013 – November 2020 to be US \$ 2 628 015 and future earnings from December 2020 – age 65 to be US \$ 3 341 337, with a total amount of US \$ 5 969 352. The actuary concluded that the exchange rate from a US dollar to rand at

that date was R15.50 which resulted in a total of R92 534 956.00. However, the current exchange rate from a US dollar to rand is R14.24 which currently resulted in a total amount of R84 979 515.99. Be that as it may, it was stated in the plaintiff’s written submissions that he has reduced his claim for patrimonial damages to R35 million.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[20] The plaintiff’s case and his evidence remains uncontested. From the evidence presented, it is clear that the plaintiff was severely tortured. It remained common cause that the arrest of the plaintiff was ordered by the defendant. In addition, Angabe and the defendant are close

business partners. The plaintiff was arrested more than once by the RIF, who are the private forces of the defendant in instances where the plaintiff had no dealing whatsoever with the defendant, but with Angabe. The plaintiff was clear in his testimony that he had business ties with Angabe. When the airline deal fell apart and there were some disagreements subsequent thereto, the plaintiff was incarcerated in the most appalling conditions at the instance of Angabe and the defendant. That incarceration was effected, not by an order of court or a judge or in terms of some legislative provision, but by the acts of the RIF having received instructions from the defendant. As stated above, the RIF is a division of the security services in Equatorial Guinea falling under the direct control of the defendant. The RIF was subject to the control of the defendant and nobody else. The order of the defendant to arrest the plaintiff constituted a wrongful act that attracted delictual liability.

[21] To this end, I agree with the views expressed by Gamble J in *Obiang v Van Rensburg and Another* (A338/2018)

[2019] ZAWCHC writing for the unanimous full bench in an appeal against the confirmation of the attachment order to find jurisdiction, when it stated that, the RIF is a division of the security services in Equatorial Guinea Republic falling under the direct control of Mr Obiang (the defendant). The learned justice noted that in ordering the RIF to arrest and detain the plaintiff,

the defendant was advancing private interests and not the security of the state. Gamble J, also noted that Mr Obiang's order to the RIF to detain Mr Van Rensburg (the plaintiff in this case) constituted a wrongful act on his part which attracted personal

liability in delict. The court noted further that Mr Obiang abused his power and ensured that the plaintiff was incarcerated, abused and tortured. The plaintiff was held in appalling condition for an extended period of time in an endeavour to induce him to settle a private debt that arose from an agreement that went wrong. The court concluded that the wrongfulness of the conduct of the defendant is self-evident and in addition, there was no evidence presented that sought to justify the conduct of the defendant.

[22] It is undeniable that the plaintiff was tortured outside the borders of the Republic of South Africa. As explained above, this court's jurisdiction to hear this matter is based on the final attachment order that was confirmed and endorsed by the full bench of this court. Torture is a crime against humanity. Further, there is a clear and absolute prohibition of torture in international law. The prohibition applies even in times of national emergencies or wars, and there are no exceptions or justifications. Article 2(2) of the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 1984 ratified by 136 countries including South Africa and Equatorial Guinea provides that:

'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or other public

emergency, may be invoked as a justification for torture.'

- [23] Article 4 of this Convention requires States parties to criminalize the offence of torture in their domestic law, including attempts and complicity as well as participation. As defined in the Convention, the crime has two objective elements. First, it comprises 'any act by which severe pain or suffering, physical or mental', is inflicted on a person; and second, it is committed 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. The Prevention of Combating and Torture of Persons Act 13 of 2013 in South Africa came into force on 29 July 2013. This Act aims to give effect to South Africa's obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of
1984. Section 3 of this Act provides that for the purpose of the Act, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.
- [24] Meanwhile, section 12(1)(d) and (e) of the Constitution echoes the prohibition of torture provision contained in the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 1984. This section guarantees the right to freedom and security which includes the right to be free from all forms of violence from either public or private sources and the right not to be tortured in any way. Article 5 of the Universal Declaration of Human Rights also acknowledges that no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. In *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)*
- [2001] ZACC 18; 2001 (3) SA 893 (CC), the Constitutional Court noted that torture is defined in article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 as including any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as punishing him for an act he or a third person has committed or is suspected of having committed.
- [25] In my view, the evidence that was presented by the plaintiff is overwhelming that he was arrested, tormented and tortured. The main reason for his arrest was to extort money from him. He was not charged or arrested pursuant to an order of court or to any statutory provision. Gathering from the documents filed on record including the documents filed by the defendant, there is nothing presented before court that proved or suggested that the arrest and detention was justified. The fraudulent charges that Angabe concocted and levelled against the plaintiff were found to be devoid of substance and were dismissed several times by the courts in Equatorial Guinea. The plaintiff alluded to the fact that he appeared before a number of judges in Equatorial Guinea and they released him and even permitted him to leave the country.

[26] However, he was rearrested at the instance of the defendant who was pursuing his personal interest and whims. The plaintiff was tortured upon arrest in Guantanamo prison and also in Black Beach prison on several occasions. He was detained for a total of 549 days, 423 of which he was imprisoned in Black Beach prison. The conditions in prison were so horrific and appalling. His detention was based on an alleged theft of money, which on its own was unfounded. He was tightly handcuffed so much so that his wrists were cut. His hands were handcuffed to a rail in one of the rooms in a dungeon. He saw inmates being tortured there. He was thrown in a small cramped cell with countless inmates. He was tortured by other inmates in the cell at the instruction of the defendant. His arms ached from being handcuffed. He found it difficult to breathe in that cell as it was hot and humid inside. He could not even swat a cloud of mosquitos away as his hands were cuffed behind his back. He had to ask other

inmates to assist him to take of his jean so that he could relieve himself. In fact, the plaintiff explained personally and further

filed an affidavit to this court in detail on how he was tortured and manhandled by the special forces of the defendant (RIF).

[27] On a conspectus of all the evidence placed before court, I am of the view that the defendant is liable to compensate the plaintiff for unlawful arrest and detention and for the torture of the plaintiff. This leads me to the determination of the quantum of damages.

DETERMINATION

OF QUANTUM

[28] In considering quantum, it must be stressed that unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual. It is trite that the inquiry into unlawful arrest and detention seeks to determine the extent to which the various affected rights of personality were impaired and their duration. See *Takawira v Minister of Police* Case number A3039/2011 at Para 41 (South Gauteng High Court). The inquiry involve both a subjective element based on the emotional effect of the wrong

committed to the plaintiff such as the humiliation or anguish of suffering the injustice, the loss of self-esteem and respect, and an objective impairment based on the external effect of the wrong such as loss of reputation in the eyes of the others.

[29] Neethling, Potgieter and Visser in *Neethling's Law of Personality*, (Neethling's Law of Personality 2 Edition

- (2004) at 121-122) identify the factors affecting the amount of the award as relating to the invasion of a broad category of rights which may be distilled to include, the right to personal liberty, the right not to be arbitrarily arrested without lawful cause, the right to dignity and the right to one's reputation which include the right not to be defamed - See Takawira (supra) at para 36.
- [30] In *Thandani v Minister of Law and Order* 1991 (1) SA 702 it was said that in considering quantum, sight must not be lost of the fact that liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all time and there is a duty on courts to preserve this right against infringement. The Supreme Court of Appeal in *Van Eeden v Minister of Safety and Security* [2002] 4 AII SA 346 (SCA) at para 12 echoed similar sentiments and went on to say that in the current constitutional dispensation, an unlawful interference with a person's right to liberty is not only a common law issue, but is also a constitutional infringement. The effect of constitutionally entrenching rights, is that the entrenchment of fundamental rights and values in the Bill of rights enhances their protection and afford them a higher status.
- [31] In *Rahim and 14 Others v Minister of Home Affairs* 2015 (4) SA 433 (SCA) at para 27 the Supreme Court of Appeal stated as follows:
- "The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed, the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general consideration play a decisive role in the process of qualification. This does not, of course absolve a plaintiff of adducing evidence which will enable a court to make appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court ex aequo et bono. Inter alia, the following factors are relevant: (i) circumstances under which the deprivation of liberty took place; (ii) the conduct of the defendants; and (iii) the nature and duration of the deprivation.*
- [32] For the sake of completeness, I deem it prudent to consider the factors enunciated by the Supreme Court of Appeal in the *Rahim* case vis-à-vis the present matter ad seriatim with regard to the deprivation of liberty.
- (a) Circumstances under which the deprivation of liberty took place
- [33] The plaintiff explained to the court in detail how he was arrested at different intervals and detained in Guantanamo prison twice and also in Black Beach Prison. There was no basis in law or fact for his arrest or deprivation of liberty. In my view, the deprivation of plaintiff's liberty was nothing less than malicious and without reasonable and probable cause. The evidence presented was that the plaintiff appeared before various judges pursuant to fraudulent charges of theft and fraud levelled against him and they were found to be baseless and without merit. The arbitrariness of the plaintiff's arrest and detention cannot be overemphasized. The plaintiff was tremendously affected by the prison conditions. Among others, the plaintiff alluded to the fact that he was incarcerated in a prisons cell with about four hundred prisoners who had to use two

bathrooms, of which the toilets were constantly blocked and overflowing. As a result thereof, he frequently vomited when in the

bathroom. There was no running water or toilet paper. Inmates used their hand to clean their buttocks and then wiped their hands on the walls. In fact, they urinated on the floor. As a result, he got sick.

[34] I must stress the fact that the effects of the torture on the plaintiff was evident in court when he gave his testimony. The court had an opportunity to observe the plaintiff in the witness box when he led his evidence. He appeared to be tense, nervous, anxious and he expressed himself with difficulty during his testimony. The after effects of his arrest are still overwhelming on him and it seems this will take a long time to normalize if it does not remain with him for the rest of his life. In his testimony, in particular in his damages affidavit, he informs the court that he suffers acutely from the after effects of his arrest including post-traumatic stress disorder that makes his personal life extremely difficult.

[35] Without a doubt, this rendered impossible for him to work in the field in which he was trained to work and in which he practiced for most of his career. He indicated that he suffered from fatigue and dizziness brought on most often by frequent panic attacks. The plaintiff also alluded to the fact that he is always tense and nervous, imagining imminent danger at every turn. For instance, he finds himself looking anxiously outside before he goes to bed and when he wakes up. He obsessively rechecks the door locks in the house and he has great difficulty in trusting anyone even his wife and family.

(b) The conduct of the defendant

[36] I must say with respect that this is an extraordinary case of unlawful arrest and detention. This is a case that epitomizes a sheer abuse of power and authority by the defendant. The plaintiff was fortunate to have survived this ordeal. The defendant defied orders issued by judges in his country who after listening to the plaintiff's case, found that there was no basis for him to be arrested or detained. They released him. Despite the fact that they released him and gave him permission to leave the country, the defendant abused his power and rearrested the plaintiff in order to demonstrate his total disregard for the rule of law.

[37] I might as well emphasise that the defendant made efforts in this court to evade liability. Whilst both sides should be heard and I accepted that the defendant

equally enjoyed his right to a fair trial, however it should be stressed that the conduct of the defendant in this court was highly

reproachable. The defendant defied the orders of this court and this resulted in the striking out of his defence. The defendant appeared to be a law unto himself and that conduct cannot be tolerated.

[38] Importantly, what is somehow disturbing is the fact that even at the time when the plaintiff was scheduled to fly out of Equatorial Guinea and on his way to board the aircraft, Angabe instructed the police to arrest the plaintiff for no just cause. The RIF being the special protection unit of the defendant arrived, manhandled the plaintiff and roughly handcuffed him and took him to Black Beach prison. The defendant was hell-bent to ensure that the plaintiff does not leave prison and that he is tortured and abused. The plaintiff only managed to escape at the time when the defendant and Angabe were out of the Equatorial Guinea and on a visit to Brazil.

(c) The nature and the duration of the deprivation.

[39] The right of an individual to personal freedom is a right which has always been jealously guarded by our courts, and our law has always regarded the deprivation of personal liberty as a serious injury - See *Ochse v King William's Town Municipality* 1990 (2) SA 855 at 860. In my view, the incarceration had a negative effect and it left the plaintiff severely traumatised. His reputation in the community and in the circle of his peers was dented. His right to dignity and to be free from all forms of violence was seriously infringed.

[40] The unlawful arrest and detention amounted to a serious invasion of his constitutional rights. The plaintiff was in custody for 549 days for no reasonable or justifiable cause. For all the 549 days in custody, the defendant wanted him to be tortured, tormented and manhandled. In my view, the deprivation of freedom and liberty is a serious matter especially viewed from our constitutional prism. The nature and the circumstances under which the plaintiff was deprived of liberty are described in the summary of evidence above and will not be repeated herein. It must however be stressed that this court is astute to the merits of this case. In so doing, it has to ensure that the award it makes for such infringements reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law - See *Minister of Safety and Security v Tyulu* 2009 (2) SACR 282 (SCA).

[41] The non-pecuniary nature of general damages makes it difficult to assess with certainty an appropriate amount, leaving this court with a discretion to award an amount that it may deem reasonable under the circumstances. In assessing damages, reference to prior awards is a useful aid to assist a Court in determining what would be a fair and reasonable compensation, recourse being had to the specific circumstances of this case. In *Minister of Safety and Security v Tyulu*, 2009

(5) SA 85 at para 26, it was held that the correct approach is to have regard to all the facts of the particular case and to determine quantum of damages on such facts. The plaintiff's counsel has referred this court to a number of cases in his heads of argument dealing with various awards for unlawful arrest and detention.

[42] As discussed above, the plaintiff has been in custody for 549 days. The plaintiff should be compensated for the deprivation of liberty that he suffered as a result of the defendant's conduct. Such compensation must be fair and must not burden the defendant unnecessarily. Neethling, Potgieter and Visser (Law of Delict, 5 edition at 231), note that 'important guidelines to which a court should adhere in the process of quantification, are fairness and conservatism. In general this means that one should not merely out of sympathy with a plaintiff, award a large amount of money at the expense of the defendant.' The court must exercise its discretion carefully and conservatively and rather award too little than too much and the amount awarded must not unnecessarily burden the defendant in the plaintiff's favour. The award must however not be so conservative that the plaintiff does not obtain adequate compensation. In *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) Holmes J, stated as follows:

"I have only to add that the court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense."

[43] As discussed in the preceding paragraphs, I have been referred to a number of cases where our courts have awarded an average sum of between R50 000 and R100 000 per day in cases of unlawful arrest and detention. It is correct that reference to prior awards is a useful aid to assist a court in determining what would be a fair and reasonable compensation however, each case has to be dealt with according to its own merits. The object of the award of compensation is to place the plaintiff in a position he would have been in but for the commission of delict and not to enrich him. In my considered view, taking into account all the circumstances of this case, I am of the view that the sum of R18 000 per day is fair and reasonable in the circumstance. It is further my considered view that a total sum of R 9 882 000 (nine million eight hundred and eighty two thousand) as general damages for pain and suffering cannot be said to be unreasonable, especially considering the conduct of the defendant who ensured that the plaintiff was tortured, ill-treated and abused.

[44] The plaintiff also claimed the sum of R45, 000 000 (forty-five million) for loss of past and future earnings and earning capacity. In preparation of this judgment, I had some difficulty with the proof of income that the plaintiff filed in support of his claim for loss of earnings in particular, past earnings. To this end, I sent a memo to the plaintiff's legal representative inquiring on plaintiff's income immediately prior to his arrest. In response, the plaintiff filed supplementary affidavits in which he stated that the majority of his documents pertaining to his business dealing with Angabe were retained by Angabe. The plaintiff also informed the court that in the period 2010 to 2013 prior to his arrest, Angabe undertook to pay him \$5 000 (five thousand dollars) per month as a retainer. Angabe did not always pay him the exact amount each month and the payments were somewhat sporadic. Plaintiff

estimated that in the three-year period, he earned about \$200 000 in total from Angabe as a retainer for setting up the airline. He also received a commission of \$120 000 (One hundred and twenty thousand dollars) in 2010 from Angabe.

- [45] During 2010 and 2013 he acted as the Chief Executive Officer (CEO) of Equatorial Guinea Airline. Despite him holding this position, it was agreed between him and Angabe that plaintiff would continue to earn commission for his role in facilitating the conclusion of various aircraft leases. During 2012 he facilitated several ad hoc short term aircraft leases. One such lease was for a Learjet 35, which flew only for a period of three months. He earned \$200 (two hundred dollars) per flying hour and there was a minimum of 45 flying hours per month. He earned \$9000 (nine thousand) per month for three months lease.
- [46] The plaintiff also alluded to the fact that the commissions recorded in the spreadsheet used by the Actuary to calculate his loss of earnings were paid directly to him in cash or deposited into the Banco National D Guinea Equitorial Bank with account number 12004097011-08 or the account at BGFI Bank, with account number 3301900060314 the Equatorial Guinea Bank accounts. Plaintiff avers that he utilised cash to pay for his living expenses in Equatorial Guinea. He deposited some of the commission into the Equatorial Guinea bank accounts and transferred some of the income from the Equatorial Guinea bank account to his Barclays International account number 88793122. The Barclays bank statements evidence payments into plaintiff's account amounting to \$45 192 72 from the 30 December 2010 to 29 December 2011; \$104 578, 62 from 30 December 2010 to 28 December 2012 and \$38 890, 13 from 29 December 2012 to 27 December 2013.
- [47] The plaintiff averred that Angabe paid him the majority of the commission in cash and also by depositing into his Equatorial Guinea bank account. The plaintiff did not have effective control over these accounts. This was because the State exercised control over banks in Equatorial Guinea and Angabe used the accounts to maintain control over him. The plaintiff avers in his supplementary affidavit that he is unable to obtain complete statements for the Equatorial Guinea bank accounts. To this end, he estimated the commission that he earned as reflected in the spreadsheet given to the Actuary to calculate his income by analysing the aircraft particulars and consulted with one Mr Richardson his business partner, the agent responsible for sourcing the aircraft who was based in South Africa when the plaintiff was in Equatorial Guinea.
- [48] Mr Richardson corroborated the version of the plaintiff that indeed they (plaintiff and Mr Richardson) conducted a business in Equatorial Guinea between 2001 and 2013 focusing mainly on aircraft leases for Angabe and other operators or investors. They were paid commissions of up to \$400 an hour for the periods during which the aircraft were operational. In most cases, there was an agreed price for a minimum number of hours the aircraft would be deemed to be in operation for purposes of calculating the commission. Typically this would yield in excess of \$500 00 per annum which would generally be split between him and the plaintiff. He could not locate all the invoices for their commission. However, he located two recent invoices for August 2012 for the sum of \$636 000 and \$205

040, 00.

- [49] In support of his claim for loss of earnings the plaintiff also alluded to the fact that three transactions were concluded in 2012 that would have earned him an income if he was not arrested. An Aircraft, Crew, Maintenance and Insurance (ACMI) term sheet was concluded on 2 February 2012 for the lease of a Boeing 767-200 for Corisair for the period November 2012 to November 2014 for a total of commission of \$300 000.00. Another ACMI time sheet was concluded on 29 February 2012 for the lease of a Bombardier CRJ100 to Corisair for the period October 2012 to October 2014 for a total commission of \$144 000.00. Another transaction was the lease of a Bombardier CRJ100 to Corisair for the period December 2012 to December 2014 for a total commission of \$144 000.00. The December 2012 to December 2014 lease was never consummated by virtue of his unlawful detention. The Aircraft was ready for inspection and he is not aware whether the contract was consummated. The plaintiff also averred that pursuant to these contracts, there were other lease contracts that he and Richardson facilitated as reflected in the supplementary affidavit.
- [50] In his supplementary heads of argument, the plaintiff's counsel argued that the banks in Equatorial Guinea where the plaintiff was based, are controlled by the State and that it was impossible for the plaintiff to obtain his past bank statements. I must say with respect that the information placed before court relating to the payment of commission is lacking in details. The plaintiff states that the commission was paid in cash and part was deposited in the Equatorial Guinea bank accounts and he is unable to get the bank statements. However, the court notes that notwithstanding the paucity of documentary evidence of plaintiff's past income, his business partner corroborated plaintiff's version to the extent necessary that they facilitated the leasing of aircrafts to Angabe and earned commission. In my view, the documentary proof in the form of invoices and lease agreements (ACMI) filed by Richardson confirms and corroborates the contention of the plaintiff. Furthermore, the Barclays Bank Account statements exhibited to court supports the plaintiff's contention that he was earning an income prior to his arrest. The income inclusive of the commission that the plaintiff earned was used by the Actuary to calculate the plaintiff's loss of income. This court will therefore be guided by the actuarial report in making an informed decision regarding the loss of plaintiff's earnings.
- [51] It has been said that the result of an actuarial computation may be no more than an 'informed guess', it offers the opportunity to ascertain the value of damages on logical basis which is always preferable to a blind guess. See *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A) at 113G-114E. This court was also referred to the case of *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 163, where this court said:

"Our courts have long recognised that there are cases which either by their nature or due to their particular facts make the assessment of damages difficult. Where it is clear that damages have been suffered but the quantum of those damages is not conducive or precise

calculation or even certain reliable estimation, the wrongdoer will not be relieved of necessity to decide by reason of the difficulties

in assessing the quantum. Courts will do their best with the material placed before them, scant though it may be, provided only that plaintiff has placed before the court all the evidence reasonably available to assist the court in its task.”

[52] The plaintiff has been in custody for a period of one year and six months. He has been incarcerated since December 2013 to 28 February 2014 and on 04 July 2014 to 26 August 2015 in a foreign country. From the actuarial report of Johan George Schwalb, prior to his arrest, the plaintiff earned commission by arranging aircraft to be leased by clients in various African countries. In the period 2010 he earned a total commission of US\$ 120 000. It was expected that in the period 2012 to 2014 the plaintiff would have entered into three contracts providing for aircrafts in Equatorial Guinea for transactions that would have yielded an income of US\$ 588 000 over a period of twenty-four months. The opportunity for him to earn this income was frustrated by the unlawful detention. From the actuarial report provided, it is clear that the plaintiff was successful in his trade prior to his arrest. This view is fortified by the income he earned between 2010 and 2013 as reflected in his Barclays Bank Account. His ability to earn his income was interrupted by the unlawful conduct of the defendant.

[53] The Clinical Psychologist Ms Wynchank noted that prior to his arrest the plaintiff was reported to be healthy, fit and an outgoing individual. However pursuant to his arrest in Black Beach prison, the plaintiff reported to be suffering from Cerebral Malaria, Standard Malaria and Typhoid Fever. The Psychologist also noted that there is substantial evidence to suggest that the plaintiff is suffering from various mental illnesses as a result of his arrest, his detention in police custody and his period of incarceration and the violence and brutality he experienced in prison. As a result, this caused him to suffer from post-traumatic stress disorder, major depressive disorder, panic disorder, insomnia, agoraphobia and claustrophobia. As a result of these infirmities, it is highly unlikely that the plaintiff will be able to compete in the job market and work in his

previous field given his mental state, and his problems with concentration, attention and poor memory.

[54] On the other hand, the clinical psychologist Ms Coetzee, who conducted a neuropsychological evaluation of the plaintiff noted that in spite of receiving trauma counselling and psychotherapy since his release, the plaintiff remains both psychologically and cognitively affected. His capacity to compete in the open market has been permanently and irreversibly altered. Ms Coetzee noted further that plaintiff's reduced stress tolerance and his related neuropsychological difficulties constitute a significant handicap.

[55] In my view, the plaintiff has to be compensated for his past and future loss of earnings. The defendant and or his partner Angabe approached the plaintiff to partner with him in business because he was aware that the plaintiff was successful in business, hence he was made the CEO of the Equatorial Guinea Airline. Angabe wanted the expertise of the plaintiff

to assist them in launching an airline business. When the business could not take off due to a breach of contract caused by the defendant and Angabe, the defendant and Angabe abused the plaintiff and demanded refund of the money which the plaintiff expended to set the business in motion. Pursuant to that, the plaintiff was arrested and tortured. This ultimately caused him to lose his income. For the 549 days that the plaintiff was in custody, he could not earn any income. The plaintiff was also affected mentally and psychologically to work and earn an income. The unlawful arrest and detention had a long lasting effect on his ability to work and generate an income as detailed in the reports of the clinical psychologists.

- [56] It is my considered view; the plaintiff is entitled to be compensated for the income which he would have earned but for the arrest. Furthermore, his future earning capacity has been frustrated by the defendant. The debilitating psychiatric illness has affected his functioning in multiple ways. It has been established that it is unlikely that he will be able to compete in his trade or in his previous field given his mental state.
- [57] In assessing damages for past and future loss of earnings, it is important to bear in mind that the primary purpose is not to enrich the plaintiff but to compensate him for the loss he suffered. The actuary estimated past earnings to be US\$262 8015 (R37 445 061.49 in today's exchange rate) and future earnings to be US\$334 1337 (R47 604 362.37 in today's exchange rate). However, the Court noted that the Actuary did not allow for contingencies deduction on these amounts. The amounts deposited into the plaintiff's Barclays bank Account from 2010 to 2013 amounts to a total income of \$ 204 036, 36 which translates to R281 3940, 93. In my view, it is abundantly clear that the plaintiff was earning a substantial income before he was arrested.
- [58] On a conspectus of all the evidence that the plaintiff placed before court, I am of the view that the fair, reasonable and just award for past loss of earnings suffered by the plaintiff in this regard is an amount of R10 000 000 (Ten million"). Taking into account the fact that the plaintiff will no longer be able to practice his trade like he did prior to his unlawful detention, this Court is of the view that an amount of R20 000 000 ("twenty million") is fair and reasonable for the future loss of earnings. The plaintiff has also claimed constitutional damages in the sum of R 5 000 000 ("five million"). At the hearing of this matter, these damages were not pursued. In any event, I am of the view that the claim for constitutional damages could be claimed if the conduct complained about occurred in South Africa and was subject to the Constitution. In this case, the conduct complained about was not subject to the Constitution and in my view, there is no basis in law or fact for claiming constitutional damages. In the circumstances, there will be no award for constitutional damages.

ORDER

- [59] In the result, having considered all the evidential material placed before Court, judgment is granted in favour of the plaintiff against the defendant for:

59.1. Payment of the sum of R 9 882 000 (nine million eight hundred and eighty-two thousand) in respect of general damages.

59.2. Payment of the sum of R 10 000 000 (Ten million) in respect of past loss of earnings.

59.3. Payment of the sum of R 20 000 000 (twenty million) in respect of future loss of earnings.

59.4. Interest thereon on the aforesaid amount at the prescribed rate of interest from date of judgment to date of final payment.

59.5. Costs of the action including the costs of two Counsel, including the costs of the following experts:

59.5.1 Ms Nadya Wynchank;

59.5.2 Ms Mignon Coetzee and

59.5.3 Mr George Schwalb.

59.6. The defendant is ordered to pay the costs of the attachment proceedings under Case No 22470/2015 before Saldanha J and Davis J.

ACTING JUDGE OF THE HIGH COURT

WESTERN CAPE HIGH COURT

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